Neutral Citation: [2023] UKFTT 00273 (TC)

Case Number: TC08750

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/0155

VAT – Bad debt relief – s 11 FA 1990 & s 36 VATA 1994 – historical claim

Heard on: 24, 25 and 26 May 2022
Judgment date: 07 March 2023

Before

TRIBUNAL JUDGE GERAINT WILLIAMS
LESLIE BROWN

Between

ALLEGION (UK) LIMITED

Appellant

and

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: David Southern KC, counsel, instructed by RSM UK Tax and Advisory Services LLP.

For the Respondents: Sarah Black, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs.

DECISION

INTRODUCTION

1. On 14 January 2021, the Appellant appealed to the Tribunal against the decision of the Respondents ("HMRC") to refuse the Appellant's claim for retrospective VAT bad debt relief ("BDR") for the period 1 April 1989 to 19 March 1997 ("the Claim Period"). The original claim was for the amount of £615,697 (plus statutory interest) which was reduced to £584,655. The reduction was to reflect the estimated sales percentage for a division of the Appellant's group of companies called NT Access Limited that provided services and was ineligible for inclusion in the claim for BDR. The relevant supplies made by the Appellant during the Claim Period were of security systems, products and services for domestic and commercial premises.

2. HMRC rejected the claim on the basis that the Appellant could not satisfy the evidential requirements for a valid claim for BDR contained in the Revenue and Customs Brief 1 (2017): VAT – historical bad debt relief claims" ("R&C Brief 1/2017") as it could not demonstrate to HMRC that it was a valid claim for BDR and, in particular, that any claim to BDR for the Claim Period had not already been made.

PRELIMINARY ISSUE

3. The Appellant in its skeleton argument dated 3 May 2022 under the heading of "Note" indicated that it intended to "seek to add a schedule to this skeleton argument, to set out the membership of the VAT group" and "The Appellant wishes to submit an additional witness statement to deal points made below in relation to (i) 'Accounting Matters' and (ii) 'Methodology'". On 12 May 2022, the Appellant's representative, RSM UK Tax and Advisory Services LLP ("RSM") served an application for permission to file the additional witness statement of Mr Andrew Ilsley, Indirect Tax Director at RSM, together with 10 exhibits totalling 333 pages ("the Application"). The Application at [10] stated that:

> "The note to the Appellant's Skeleton Argument also mentioned a further point relating to the composition of the Appellant's VAT Group in the Claim Period. On reflection this may best be dealt with in Mr Crampton's oral evidence."

4. On 19 May 2022, HMRC served their Objection to the Application. HMRC objected to the Application on the basis that it was (i) extremely late without any explanation why it was not served earlier and (ii) the proposed evidence is the first time that the Appellant has provided the base documents upon which the calculation of the claim for BDR was based. HMRC proposed, as a possible compromise that the Tribunal should made a decision in principle on whether the Appellant has satisfied the conditions for making an historic BDR claim. In the event that the Tribunal determined that the Appellant had made a valid BDR claim the parties could reach agreement as to the quantum of the BDR claim or, failing agreement, make an application for the Tribunal to determine quantum. In a written decision dated 20 May 2022, the Tribunal refused the Application on the basis that it could only be concluded that it would be unjust and unfair at such a late stage to grant the Application and directed that the issues before the Tribunal should be determined in principle with quantum, if relevant, to be agreed by the parties. In respect of the point at [10] in the Application, Judge Williams stated that this was not an appropriate way for the Appellant to adduce further evidence at this late stage, if it now seeks to adduce additional information it should make an application for permission together with detailed reasons.

5. The Application was renewed at the hearing and was again refused by the Tribunal. The reasons for the refusal were: the lateness of the Application, no adequate explanation for the delay nor was it clear from the spreadsheets who at RSM had produced them, the methodology followed or the documents considered. Furthermore, we did not consider that the additional documents were material to the determination that we had to make in this appeal and may only

be of relevance in the event that we find in favour of the Appellant and quantum cannot be agreed.

RELEVANT LEGISLATION

6. The BDR Claim was made pursuant to Article 11C (1) of the 6th Council Directive 77/388/EEC (now Article 90 Directive 2006/112/EC), which stated:

> "In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member State. However, in the case of total or partial non-payment, Member States may derogate from this rule."

7. For claims made in respect of supplies made on or after 1 April 1989, the Finance Act 1990 applied. Section 11 provides:

> "11.
>
> (1) Subsection (2) below applies where-
>
> (a) on or after 1st April 1989 a person has supplied goods or services for a consideration in money and has accounted for and paid tax on the supply,
>
> (b) the whole or any part of the consideration for the supply has been written off in his accounts as a bad debt, and
>
> (c) a period of two years (beginning with the date of the supply) has elapsed.
>
> (2) Subject to the following provisions of this section and to regulations made under it the person shall be entitled, on making a claim to the Commissioners, to a refund of the amount of tax chargeable by reference to the outstanding amount.
>
> (3) In subsection (2) above "the outstanding amount" means –
>
> (a) if at the time of the claim the person has received no payment by way of the consideration written off in his accounts as bad debt, an amount equal to the amount of the consideration so written off;
>
> (b) if at that time he has received a payment or payments by way of the consideration so written off, an amount by which the payment (or the aggregate of the payments) is exceeded by the amount of the consideration so written off.
>
> (4) A person shall not be entitled to a refund under subsection (2) above unless-
>
> (a) the value of the supply is equal to or less than its open market value,
>
> and
>
> (b) in the case of a supply of goods, the property in the goods has passed to the person to whom they were supplied or to a person deriving title from, through or under that person.
>
> (5) Regulations under this section may-
>
> (a) require a claim to be made at such time and in such form and manner as may be specified by or under the regulations;
>
> (b) require a claim to be evidenced and quantified by reference to such records and other documents as may be so specified;

(c) require the claimant to keep, for such period and in such form and manner as may be so specified, those records and documents and a record of such information relating to the claim and to subsequent payments by way of consideration as may be so specified;

(d) require the repayment of a refund allowed under this section where any requirement of the regulations is not complied with;

(e) require the repayment of the whole or, as the case may be, an appropriate part of a refund allowed under this section where the claimant subsequently receives any payment (or further payment) by way of the consideration written off in his accounts as a bad debt;

(f) include such supplementary, incidental, consequential or transitional provisions as appear to the Commissioners to be necessary or expedient for the purposes of this section;

(g) make different provision for different circumstances.

(6) The provisions which may be included in regulations by virtue of subsection (5)(f) above may include rules for ascertaining –

(a) whether, when and to what extent consideration is to be taken to have been written off in accounts as bad debt;

(b) whether a payment is to be taken as received by way of consideration for a particular supply;

(c) whether, and to what extent, a payment is to be taken as received by way of consideration written off in accounts as a bad debt.

(7) The provisions which may be included in regulations by virtue of subsection (5)(f) may include rules dealing with particular cases, such as those involving part payment or mutual debts; and in particular such rules may vary the way in which the following amounts are to be calculated-

(a) the outstanding amount mentioned in subsection (2) above, and

(b) the amount of any repayment where a refund has been allowed under this section.

(8) No claim for a refund may be made under subsection (2) above in relation to a supply as regards which a refund is claimed, whether before or after the passing of this Act, under section 22 of the 1983 c. 55. Value Added Tax Act 1983 (existing provision for refund in cases of bad debts).

(9) Section 22 of that Act shall not apply in relation to any supply made after the day on which this Act is passed.

(10) Sections 4 and 5 of that Act shall apply for determining the time when a supply is to be treated as taking place for the purposes of construing this section.

(11) That Act shall be amended as follows-

(a) in section 39(1A)(b) after the word “above” there shall be inserted the words “or section 11 of the Finance Act 1990”;

(b) in section 40(1)(f) after the words “section 22 above” there shall be inserted the words “or section 11 of the Finance Act 1990”.

(12) In section 13(2) of the 1985 c. 54. Finance Act 1985, the word “and” at the end of paragraph (b) shall be omitted and after paragraph (c) there shall be inserted the words “and

(d) A refund under section 11 of the Finance Act 1990."

S.11(4) above is referred to as the "Property Condition".

8. Section 36 VATA 1994 replaced s 11 FA 1990. For the purposes of this Appeal, there are no material differences between s 36 VATA and s 11 FA 19903, other than the period referenced in s 11(1)(c) of two years reducing first to 12 months (by the Finance Act 1991), then to six months (by the Finance Act 1993). The requirements to qualify for BDR were set out in HMRC's VAT Notice 700/18 (April 1991, January 1996, and April 1996). VAT Notice 700/18 is referred to in R&C Brief 1/2017. The Notices particularised the availability of BDR and evidential requirements. Relevantly for these purposes, the January 1996 VAT Notice stated:

> "4. If you have made supplies to your customers on or after 1 April 1989 and have not been paid, you can claim relief from the VAT on bad debts for the goods or services you supplied if you can meet all of the following conditions …
>
> - In the case of a supply of goods, ownership has passed to the customer or through the customer to a third party …
>
> 5. Before you claim a refund you must have:
>
> - A copy of the tax invoices relating to the supplies on which you are claiming a refund. (If you did not issue a tax invoice you must have a document showing the equivalent information) and;
>
> …
>
> If you supplied goods under a contract with a clause reserving title until they have been paid for (a Romalpa clause), and the goods have not been passed on with good title to a third party, you must send your customer a statement formally giving up your rights under the clause."

9. Section 39 of the Finance Act 1997 repealed the Property Condition:

> "(1) In section 36 of the Value Added Tax Act 1994, paragraph (b) of subsection (4) (condition of bad debt relief that property in goods supplied has passed) shall not apply in the case of any claim made under that section in relation to a supply of goods made after the day on which this Act is passed.
>
> …
>
> (3) Subsection (2) above has effect in relation to any entitlement under section 36 of that Act of 1994 to a refund of VAT charged on a supply made after 26 November 1996.
>
> …
>
> (5) No claim for a refund may be made in accordance with section 22 of the Value Added Tax Act 1983 (old scheme for bad debt relief) at any time after the day on which this Act is passed."

10. The VAT Regulations 1995 relevantly provide:

> "Regulation 165A
>
> (1) Subject to paragraph (3) below, a claim shall be made within the period of 4 years and 6 months following the later of-

(a) the date on which the consideration (or part) which has been written off as a bad debt becomes due and payable to or the order of the person who made the relevant supply; and

(b) the date of the supply.

(2) A person who is entitled to a refund by virtue of section 36 of the Act, but has not made a claim within the period specified in paragraph (1) shall be regarded for the purposes of this Part as having ceased to be entitled to a refund accordingly.

(3) This regulation does not apply insofar as the date mentioned at sub-paragraph (a) or (b) of paragraph (1) above, whichever is the later, falls before 1st May 1997.

Regulation 166

(1) Save as the Commissioners may otherwise allow or direct, the claimant shall make a claim to the Commissioners by including the correct amount of the refund in the box opposite the legend "VAT reclaimed in this period on purchases and other inputs" on his return for the specified accounting period in which he becomes entitled to make the claim or, subject to regulation 165A, any later return.

Regulation 167

Save as the Commissioners may otherwise allow, the claimant, before he makes a claim, shall hold in respect of each relevant supply –

(a) Either –

(i) a copy of any VAT invoice which was provided in accordance with Part III of these Regulations, or

(ii) where there was no obligation to provide a VAT invoice, a document which shows the time, nature and purchaser of the relevant goods and services, and the consideration therefor,

(b) Records or any other documents showing that he has accounted for and paid the VAT thereon, and

(c) Records or any other documents showing that the consideration has been written off in his accounts as a bad debt.

Regulation 168

(1) Any person who makes a claim to the Commissioners shall keep a record of that claim.

(2) Save as the Commissioners may otherwise allow, the record referred to in paragraph (1) above shall consist of the following information in respect of each claim made-

(a) in respect of each relevant supply for that claim-

(i) the amount of VAT chargeable,

(ii) the prescribed accounting period in which the VAT chargeable was accounted for and paid to the Commissioners,

(iii) the date and number of any invoice issued in relation thereto or, where there is no such invoice, such information as is necessary to identify the time, nature and purchaser thereof, and

(iv) any payment received therefor,

(b) the outstanding amount to which the claim relates,

(c) the amounts of the claim,

(d) the prescribed accounting period in which the claim was made, and

(e) a copy of the notice required to be given in accordance with Regulation 166A.

(3) Any records created in pursuance of this regulation shall be kept in a single account to be known as the "refunds for bad debts account."

Regulation 169

(1) Save as the Commissioners may otherwise allow, the claimant shall preserve the documents, invoices and records which he holds in accordance with regulations 167 and 168 for a period of 4 years from the date of the making of the claim."

11. In *GMAC UK plc v Revenue and Customs Commissioners* [2017] STC 1247 ("*GMAC*") the Court of Appeal decided that the Property Condition was not compatible with EU law, was disproportionate and should be disapplied. The Property Condition was repealed from 19 March 1997. This prompted HMRC to publish R&C Brief 1/2017. This recognised that taxpayers may have historic BDR claims for the period 1 April 1989 to 19 March 1997 and the Brief explained how HMRC would deal with historic claims. HMRC accepted that meeting all of the evidential criteria of the BDR scheme would be difficult given the passage of time, and therefore alternative evidence would be accepted. A claimant was; however, still required to demonstrate that bad debts had been incurred in the relevant period, that no claims for BDR had already been made and that the amount claimed was as accurate as possible and fairly and reasonably calculated.

12. R&C Brief 1/2017 stated:

Purpose of this brief

This brief sets out HM Revenue and Customs' (HMRC) position on claims for historical bad debt relief following the Court of Appeal's judgments in British Telecommunications of 11 April 2014 and GMAC UK Plc on 25 October 2016.

Readership

VAT registered businesses that suffered bad debts on supplies they made between 1 January 1978 and 19 March 1997 and that didn't adjust the VAT on such debts.

Background

The UK VAT Bad Debt Relief scheme was introduced in 1978. Since then the conditions of the scheme have changed:

• before 1 April 1989, the scheme required the defaulting customer to be formally insolvent

• until 19 March 1997, there was also a condition that title in any goods must have passed to the customer

The litigation concerned the bad debt relief legislation that existed between 1978 and 1997 and doesn't affect the current scheme set out in Notice 700/18 Relief from VAT on bad debts.

The Court of Appeal found that the above former conditions were disproportionate. However, it also decided that it was too late to make claims

under the scheme that existed before 1 April 1989. The outcome of the litigation is, therefore, that:

• claims relating to bad debt relief on any supplies made prior to 1 April 1989 will be refused

• claims relating to supplies of goods made between 1 April 1989 and 19 March 1997 will be paid subject to satisfactory evidence that the bad debts occurred and that the VAT hasn't been previously reclaimed - claims not subject to capping

Evidence

In addition to where title in goods passed on supply, between 1989 and 1997, Notice 700/18 made clear that title in goods would pass, and therefore bad debt relief would apply, where either of the following occurred:

• goods in question had been sold on to a third party by the debtor

• supplier chose to write to their customer and give up title in the goods to them

It's therefore possible that businesses may have previously claimed relief during this period under these terms. HMRC considers this unlikely to be the case in circumstances where businesses routinely repossessed high value goods following default by the customer. It is more likely that VAT bad debt relief may have been claimed where, for example, goods were supplied to customers who purchased the goods for resale.

To ensure that any businesses making claims in the light of the GMAC case haven't previously claimed relief, claims will need to meet the requirements set out in conditions 1 to 5 in paragraph 2.2 of Notice 700/18.

If a business can't meet these requirements it will need to satisfy HMRC by other means that it didn't previously obtain bad debt relief. HMRC will consider alternative evidence for amount and methodology. The responsibility is on the claimant to show:

• that they suffered bad debts on supplies of goods made under retention of title terms

• they didn't previously claim relief

• the amount claimed is correct

Claims already with HMRC will be dealt with in line with this brief although we may need to contact claimants for further information. New claims should be made in writing, quoting Revenue and Customs Brief 1 (2017), and sent with full supporting evidence …"

WITNESS EVIDENCE

13. The Tribunal heard oral evidence from Mr Christopher Crampton, a Chartered Management Accountant, employed by the Appellant as a Home & Work Controller. Mr Crampton adopted and confirmed his witness statement dated 28 October 2021 ("WS"). Mr Crampton answered questions in straightforward manner and was open concerning matters raised that he had no knowledge of.

14. Mr Crampton's evidence included the following points.

(1) He joined the Appellant as a trainee accountant in 1987, qualified as a Management Accountant in 1991 and has been continuously employed by the Appellant in a number of accountant positions since 1987.

(2) In April 1988, he was promoted to Assistant Accountant and had responsibility for the preparation of VAT returns. During 1990 he was promoted to the role of Project Accountant and was responsible for reviewing VAT returns prepared by junior staff, this role continued until 1998. During this time, Mr Crampton assumed responsibility for recovery of goods in reliance upon the Appellant's retention of title ("RoT") clause. Throughout his employment the Appellant retained its own autonomous accounting function.

(3) He confirmed from details obtained from Companies House and from the changes from 1998 onwards during his period of employment that the Appellant had undergone the changes of names set out below some of which occurred as a result of changes of ownership of the Appellant:

(a)	31 December 1979	Newman-Tonks Group plc
(b)	2 April 1985	Newman Tonks Group Limited
(c)	30 April 1998	Ingersoll-Rand Architectural Hardware Group Limited
(d)	13 September 2000	IR Security & Safety Limited
(e)	10 March 2006	Ingersoll Rand Security Technologies Limited
(f)	6 December 2013	Allegion (UK) Limited

(4) The Appellant registered for VAT on 1 April 1973, the Appellant had always been a member of the VAT Group with other companies. The VAT registration number of the VAT Group is 110 6214 33 and the registration number has remained unchanged throughout his employment. The principal business activity of the Appellant remained unchanged throughout different ownerships. The Appellant changed ownership when it was acquired by Ingersoll Rand in 1997 and underwent a further change of ownership in December 2013 when it demerged from Ingersoll Rand. The principal business activity of the Appellant is the provision of security systems, products and services for domestic and commercial premises specialising in mechanical hardware including, locks, door closers, exit devices and steel doors and frames.

(5) In 2017, he was made aware by RSM of the potential to make an historic claim for BDR for the Claim Period following litigation between GMAC UK plc and HMRC. Until that point, he had worked on the basis that the Appellant was unable to claim BDR as the Appellant had, throughout his period of employment, incorporated a clause in its sales contract retaining title to the goods until full payment was received. A copy of the Appellant's Terms and Conditions dated 4 September 2000 was exhibited, no earlier copies could be found.

(6) His recollection was that during the last 20 years he estimated that the Appellant had used its retention of title clause to recover goods on around 15 to 20 occasions. He personally dealt with a number of insolvency practitioners to demonstrate that the Appellant had retained title to the goods and estimated that he did this on five occasions. He was certain that the Appellant included a RoT clause in its contract and this included the period covered by the Claim Period.

(7) He was aware from the Respondents' Statement of Case that three "Schedules of Irregularity" ("Schedules") relating to the Appellant's VAT registration had been located which referenced BDR and factoring. In respect of the Schedules he noted that the HMRC Schedules dated 2 July 1991 and 27 September 1991 are headed: "Thomas Laidlaw Limited Branch 0510" and the HMRC Schedule dated 2 October 1992 is headed:

"Thomas Laidlaw Limited" (together "TLL"). TLL was acquired during 1990 and added to the Appellant's VAT group. The Appellant was keen to ensure that TLL retained its separate identity in the market and TLL traded on identical terms to the Appellant's other customers and was subject to the same pricing policies. TLL retained its own trading terms and accounting team. It appeared from the Schedules that TLL's terms may not have included a RoT clause and may have used debt factoring. He did not have any knowledge of TLL's terms or accounting practices save that TLL used to provide its accounting data for assimilation into the VAT group return. He knew that TLL operated by using a number of self-accounting branches as evidenced by the Schedule which references "Branch 0510" and confirmed that HMRC conducted at least one inspection on one of the TLL accounting locations.

(8) He acknowledged that HRMC had identified that a member of the Appellant's VAT group had claimed BDR during the Claim Period, this was done by an acquired business with an autonomous accounting department which operated on its own contractual terms. He stated that the Appellant had, throughout his employment, operated a RoT clause which prevented a claim to BDR. He would have remembered claiming BDR because the mechanism via which such a claim would have been made would have involved the use of journal entries, such entries require specific consideration and would have been separately identified at the preparation of the VAT return.

(9) In respect of the RoT clause:

(a) The Appellant's policy was not to surrender title prior to full payment being received;

(b) The Appellant did not know what had happened to the goods once supplied or at what point the relevant goods were incorporated into buildings;

(c) There was no process in place to retrospectively review potential BDR claims, the Appellant took the view that no claims to BDR were available because of its ROT and a claim for BDR required that title be surrendered to the debtor; and

(d) Credit facilities were suspended if the customer went more than 14 days past the payment date.

(10) His recollection was that the Appellant did consider recourse factoring but it was concluded that the cost was greater than the Appellant's cost of capital. He had encountered some factoring within the corporate group. Bobcat Europe (based in Belgium) did engage in recourse factoring, this is the only example of factoring within the Appellant's group of companies that he had direct knowledge and experience of. No primary records were retained for the Claim Period. To his knowledge, all sales were standard rated, all credit sales were made using RoT with the exception of the two divisions identified which were separate parts of the business over which he had no oversight or responsibility and no previous BDR claims had been made.

(11) In response to questions in cross-examination:

(a) He had not worked on the Appellant's corporate accounts nor on the Appellant's VAT group accounts during the Claim Period. He had no involvement with the Appellant's group VAT returns. He had worked for two individual subsidiaries during the Claim Period, he was probably involved in about four or five subsidiaries during the Claim period not all of which were in the VAT group. There were about 20 to 30 subsidiaries;

(b) He had prepared VAT templates for subsidiaries which were then submitted to and reviewed by the financial controller/company secretary and then incorporated into the group VAT return. After he was promoted in 1990, he only prepared one or two VAT returns for subsidiaries and had reviewed three individual template returns. His equivalent would have done the same for the other subsidiaries. He was not a VAT or tax specialist.

(c) The group accounts setting out group membership were not in evidence before the Tribunal and that the group composition did not stay the same during the Claim Period.

(d) The examples in his evidence were all from the last 20 years and were all outside the Claim Period. His earliest recollection of exercising a RoT clause was 1998, after the Claim Period. After the takeover in 1997 Ingersoll Rand carried out a review of the business and some subsidiaries were divested. He accepted that, following the takeover and review, it was possible that the Appellant's standard terms and conditions could had have changed.

(e) He agreed that the Schedules confirmed that some subsidiaries did claim BDR and used debt factoring. He had no knowledge of or involvement with TLL. He stated that the Schedules would imply that he had not seen everything in the whole group and factoring could have been more widely used than he had seen.

(f) He accepted that BDR does not have to be separately identified on VAT returns and it would not be clear from a VAT return if BDR had been claimed.

(g) He accepted that RoT was infrequently relied upon as it was very difficult to prove that the incorporated goods were supplied by the Appellant as they were sold through multiple channels and sold on. It was accepted that the recovery of goods relying upon RoT was insignificant compared to a group of this size.

(h) He recalled for the first time in cross-examination that the Appellant's policy on RoT was set out in a book where such matters were detailed but that book was not in evidence before the Tribunal nor mentioned previously.

(i) He accepted that, if goods were incorporated, they could not be recovered.

(j) He accepted that the Appellant's claim appeared very similar to that in *Saint-Gobain Building Distribution Limited v R&C Comrs* [2019] UKFTT 0314 (TC) ("*Saint-Gobain*").

SUBMISSIONS

15. There was no real dispute between the parties as to the applicable law, the issue in dispute is whether the Appellant can demonstrate that it satisfies the conditions for making an historic BDR Claim.

Appellant's submissions

16. Mr Southern submitted as follows for the Appellant.

17. The Appellant's claim is that:

(1) During the Claim Period, the Appellant suffered a certain percentage of bad debts which contained an element of unpaid VAT which had already been accounted to HMRC

(2) Its standard contracts included a RoT clause which prevented a BDR Claim except in cases where goods were repossessed pursuant to the RoT clause.

(3) Consequently, the Appellant failed to recover VAT which it would otherwise have been entitled to recover, but whose recovery was wrongly prevented by non-compliant UK law.

(4) No previous recovery of BDR has been made except in certain specific circumstances.

(5) The amount of overpayment can be reliably estimated.

18. The ordinary rule in VAT is that goods are supplied when they are delivered, not when ownership passes: *Staatssecretaris van Financien v Shipping & Forwarding Enterprise BV* [1991] STC 627. Thus a supply of goods takes place for VAT purposes when possession is transferred, not when title is transferred. During the Claim Period the UK had chosen to impose a restriction on VAT BDR in a manner which was later held to be in breach of EU law. Section 11(4)(b) FA 1990 and s 36(4) VATA 1994 denied a refund unless "in the case of a supply of goods, the property in the goods has passed to the person to whom they were supplied or to a person deriving title from, through or under that person." That Property Condition was held to be a breach of the principle of effectiveness: *GMAC* (at [85-91]); it was thus ineffective ab initio: *Deutsche Morgan Grenfell v IRC* [2007] STC 1 ("*DMG*") (at [23]).

19. The Appellant suffered commercial bad debts in the Claim Period. UK law denied BDR on the bad debts because the Appellant sold to customers on terms incorporating a RoT clause; the only reason BDR was not claimed was because of the Property Condition; that was a problem caused by HMRC's incorrect incorporation of the Property Condition into UK law, as found in *GMAC*. The Appellant did not claim BDR at the time; if relief had been claimed then the Appellant's witness, Mr Crampton would have known this, and the Appellant would not now be making this claim. By the presumption of regularity it can be assumed that the Appellant complied with the (then) legal framework and conditions; also, any contemporaneous claims would have been spotted and disallowed by HMRC (on their then understanding of the Property Condition). The Appellant was a well-run commercial organisation which took its responsibilities seriously.

20. DMG makes it clear that, so long as the national legislation says what is says, a taxpayer must assume that what is says is correct: *DMG* at [113]-[114]. Thus there must be a presumption of regularity, and so non-recovery.

21. The common law rule is that "no one gives who possesses not" (*nemo dat qui non habet*). In other words, one person with a limited right to property cannot confer on another a superior right to that property. This principle is extensively modified both by statute and decisions of the courts. Section 25 Sale of Goods Act 1979 ("SOGA ") provides that a buyer in possession of goods can, if certain conditions are fulfilled, give a good title to a person who acquires the goods from him.

22. Section 17 SOGA provides that property in the goods passes when the parties intend it to pass. Hence, the seller of goods will usually protect itself by retaining title under the sale agreement until payment. While the goods are in the possession of the buyer, the seller has the right to retake the goods. As this is a proprietary right, it will survive the buyer's insolvency. However, any attempt to retain a proprietary interest in the products of the goods or in the proceeds of sale of the goods is likely to be characterised as a charge and unenforceable in the absence of registration. The seller's proprietary interest is limited to an interest in the goods themselves. The seller can always expressly waive his RoT and HMRC say he should have done so in these cases in order to be able to claim BDR. SOGA does not provide that there may be an implied release from the RoT clause but that in prescribed circumstances it will be defeated by a subsequent transfer.

23. Section 25 SOGA was an exception to the general principle that title only passed on full payment, by allowing a non-owner to pass title to a third party and must be interpreted strictly. Where goods were incorporated into another form (e.g. door locks into a building) then the goods ceased to exist as a distinct item and the contract between the customer and the third party was not a contact for the sale of goods. The type of goods which the Appellant's group sold are likely to be incorporated into a building. Bad debts will often be accounted for on a global basis rather than on an individual basis.

24. The retention of title clause prevented BDR, unless the goods were sold on by the customer, that was clear from s 11(4)(b) FA 1990, but was of very limited application. In practice a supplier may only find or conclude that he has not been and will not be paid until some time after the sale when the notion of waiving the RoT clause had become academic. The supplier will not usually know what the client does with the goods. The only way for the Appellant to avoid the Property Condition was to waive the RoT clause in specific cases (as suggested in HMRC's Notice 700/18 – which seemed wholly uncommercial) and Mr Crampton's evidence was that this was contrary to the Appellant's company policy and he could not recall that ever being done.

25. The defect in UK VAT legislation was that it deferred time of supply to the time when title was transferred, where the contract contained a retention of title clause. For VAT purposes there is no difference between credit sales where the contract contains a reservation of title clause and credit sales where there is no retention of title condition. HMRC were wrong to contend that *GMAC* only concerned the simpler case of cars being sold on hire purchase. The position was stated by Floyd LJ in *GMAC*:

> "[80] The property condition does not only have the effect of excluding from relief all bad debts incurred in connection with hire purchase agreements. It goes further and excludes relief in the case of any contract for the supply of goods which contains a *Romalpa* (retention of title) clause (see *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552, [1976] 1 WLR 676). So the question one has to ask is not, as Mr Beal [HMRC counsel] suggested, whether there is something special about bad debts in the field of hire purchase which justifies their exclusion from the scheme, but whether one can justify the exclusion of all supplies of goods where title is retained."

26. It was accepted that it is for the Appellant to show (on the balance of probabilities) that (i) no prior recovery has been made, and (ii) the overpaid VAT can be quantified with sufficient accuracy.

27. The key factor is that the UK legislation wrongly blocked BDR, by imposing an invalid condition. The only relevant question is: did the statutory wording apply to reservation of title clauses, such as the contractual terms used by the Appellant? The answer is 'Yes'. In that case the argument that, hypothetically, the Appellant could have recovered BDR in the Claim Period, notwithstanding the statutory provision to the contrary (the Property Condition), is irrelevant. The only relevance of HMRC's argument would be if it supported a possibility that, notwithstanding what the law said, taxpayers had in fact recovered VAT. There must be a presumption of regularity, and so non-recovery.

28. It would be inconsistent with the principle of effectiveness for HMRC to block an historical claim by relying on UK procedural law matters. *Amministrazione Delle Finanze Dello Stato v San Giorgio* [1985] 2 CMLR 658 ("*San Giorgio*") stated at [14] that any requirement of proof which has the effect of "making virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law". The right to recover input VAT is directly effective,

notwithstanding the discretion left to Member State regarding its exercise, *Garage Molenheide BVB v Belgium* (Joined Cases C-286/94 and C-47/96) [1998] STC 126, AG at paragraphs 31-32. In the absence of EU rules governing repayments and time limits, it was for the domestic law of each Member State to designate the courts and tribunals having jurisdiction and to lay down detailed procedures, *Marks & Spencer* (Case C-62/00) (2002] STC 1036, ECJ paragraph 14. The principle of proportionality is also relevant in this appeal. This principle applies throughout EU law including VAT, *Garage Molenheide* at [45]-[49]. At a minimum, it means that national rules of procedure and rules of evidence cannot defeat an historic VAT repayment claim, given the fundamental nature of the right to repayment, unless the impact of the rules in the particular case can be justified as proportionate. HMRC's guidance on *Fleming* claims provides an important context, where HMRC stated that there is no special relaxed evidential rule for historic VAT claims, but "we will accept estimated claims provided that the assumptions on which the estimates have been based are reasonable and sustainable."

29. Because of the passage of time, the original evidence was no longer available. Most of those employed by the suppliers will have moved to other employers, retired or died. Alternative evidence was available and although inherently of lesser value, it could be relied upon especially as the absence of the original evidence was because the Property Condition had previously barred BDR claims. Approximation was sufficient, provided it supported the conclusions drawn from it – see the Upper Tribunal in *Lothian NHS Health Board v RCC* [2015] STC 2221 at [21-23].

30. The legal inability to recover BDR, because of the Property Condition, was strongly suggestive of no prior recovery. When one is trying to prove a negative, then the absence of information was itself relevant.

31. As regards the Schedules, these related to a company known as TLL. This company was in a special position. It was acquired by the Appellant in 1990. For commercial reasons it retained its own trading terms and accounting teams. It appears that its sale terms did not include a RoT clause and it may have used debt factoring. The Schedules are only pertinent to TLL. Mr Crampton's evidence is that it was highly unlikely that the UK Group, especially a group the size of the Appellant, would have used factoring, let alone non-recourse factoring. The Appellant's cost of capital was lower than the cost of factoring, so there was no commercial reason to use factoring. The sales of TLL could be excluded from the Claim to remove the possibility of over-recovery in this respect. It does not afford a ground for rejecting the whole Claim.

32. The assumptions and methodology of the Claim are set out in RSM's letter dated 23 May 2018. There are reliable group accounting records for five of the seven periods of account which come within the Claim Period which show the percentage of bad debts suffered. These also show the percentage of UK turnover as a proportion of worldwide turnover so the bad debt figures are based on actual figures. For the two years ending 31 October 1990 and 31 October 1996 the accounts do not show the percentage of bad debts so an average figure for bad debts in the period has been used. The original calculation was revised to remove the sales of NT Access Ltd, which only provided services and was not affected by the restrictions of VAT BDR on sales of goods.

33. The astute observer will have noted that the submissions made by Mr Southern on behalf of the Appellant are, for all intents and purposes, identical to those made to the Tribunal in *Saint-Gobain.*

34. It was in oral submissions that, for the first time, Mr Southern submitted that the decision of the UT in *Saint-Gobain Building Distribution Limited v R&C Comrs* [2021] UKUT 75 (TCC) ("*Saint-Gobain UT*") could be distinguished on the basis of the quality of Mr

Crampton's evidence. He worked for 35 years in a senior finance position in the Group throughout the Claim Period and had direct first-hand knowledge of the Group and was familiar with its VAT compliance and what its accounting procedures were. Mr Crampton provided full and informative answers. He can be certain that the Group's standard terms contained a RoT clause in the same or similar terms to the terms used by the Group in September 2000. He was aware that the BDR rules prevented a claim to BDR where title to the goods title to the goods was retained by the seller. It was the policy of the Group not to surrender title to goods in cases of payment difficulty because it was regarded as commercially important to retain title. That Group policy was binding on tax compliance. As regards TLL, this was a minor problem and had been dealt with by Mr Crampton in his evidence.

35. We note that the claim to "statutory interest" was not in the Appellant's Notice of Appeal nor particularised.

HMRC's submissions

36. Ms Black made the following submissions on behalf of HMRC.

37. In summary, HMRC position is:

(1) HMRC's primary position is that as the Appellant cannot properly evidence its claim and discharge the burden of proof, its appeal should fail. The Appellant's witness, Mr Crampton, does not provide evidence fulfilling the evidential requirements contained in Regs 167 and 168 or any actual evidence on whether BDR claims for the Claim Period had been made.

(2) The limited evidence before the Tribunal is that BDR was claimed by some of the Appellant's subsidiaries and that debt factoring was used.

(3) The facts of this appeal fall squarely within the facts of the Tribunal decision in *Saint-Gobain* and, following the decision in *Saint-Gobain UT*, this Tribunal is bound by that decision. The evidence of Mr Crampton is not a sufficient basis to distinguish the decision in *Saint-Gobain UT*.

38. The burden of proof is on the Appellant and it has produced no evidence fulfilling the requirements for a BDR claim, see *Regency Factors plc v The Commissioners for HM Revenue and Customs* [2022] STC 323, at [39]-[42]. The courts have made it clear, even in the context of *Fleming* claims, that it is for the claimant to establish its case, including as to whether claims had not been previously made. The fact that this is an historic claim does negate the need to evidence the claim. HMRC are not denying the Appellant's *San Giorgio* right, it is clear the HMRC accept valid claims but they do have to be valid claims, see HBOS *plc; Lloyds Banking Group plc v HMRC* [2021] UKFTT 307 (TC). HMRC are able and willing to be flexible regarding evidence but there does need to be evidence.

39. The Appellant's reliance upon NHS Lothian for the proposition that "… *if there is a valid claim, difficulties of evidence and quantification should not as such be a barrier to the making of an order for the repayment of VAT*" is misplaced as the Appellant has not come close to overcoming the first hurdle that there is a valid claim, this decision adds nothing further. The Appellant's appeal rests primarily on the evidence of Mr Crampton. HMRC refer the Tribunal to *Gestmin SGPS S.A. v Credit Suisse* [2013] EWHC 3560 and *Kogan v Martin* [2019] EWCA Civ 1645 as to the approach to be taken to assessing his evidence and fallibility of human memory. Mr Crampton's evidence is all from memory and recollection and prefaced with "on reflection" or "as I recall". During the Claim period he was not employed in a senior position in the Appellant's group nor was he involved in preparing and submitting Group VAT returns.

40. HMRC's Statement of Case put the Appellant to proof as to what percentage, if any, of sales resulted in bad debts written off by the Appellant. The Appellant's skeleton argument sets

out a brief description of the methodology used and simply asserts that the Group accounts show the percentage of bad debts suffered. No accounts are in evidence before the Tribunal and the Appellant has failed to establish it suffered from any bad debt during the Claim Period.

41. The Appellant has only produced terms and condition with a RoT clause that are dated after the Claim Period. There is no direct evidence that such a clause was contained in the relevant contracts during the Claim Period. Even if there was a RoT clause during the Claim Period (or it is inferred that there was one), HMRC consider that this would have been ineffective for the following reasons:

(1) Property would have passed under the relevant contracts as the Appellant expressly permitted the buyer to resell the goods or, in any event, under s.25 of SOGA.

(2) Where there was no permission to resell the relevant goods, such resale would have constituted a conversion of the goods leading to the Appellant's title being extinguished pursuant to s.3(2) Limitation Act 1980 for failure to pursue an action in conversion. HMRC note that clause 2(b) of the sample terms and conditions from 2000 expressly authorises the Appellant's customer to sell on the goods.

(3) Some or all of the relevant goods could have been incorporated in a process of construction or attached to other goods or to premises and could not be easily removed, such that any retention of title clause by the Appellant was ineffective (as was held in Saint-*Gobain UT*). It was accepted in the Appellant's skeleton argument that the type of goods which the Appellant sells are likely to be incorporated into buildings, e.g. as door locks, and so lose their separate identity and become part of the building.

42. HMRC submit that that Property Condition had no impact on the Appellant during the Claim Period and it could have made BDR claims. Following the reasoning of the Tribunal in Saint-*Gobain FTT*, on the balance of probabilities, it is likely that the Appellant did make claims for BDR during the Claim Period. There is no direct evidence before the Tribunal to undermine this. In contrast, the limited contemporaneous evidence that does exist indicates that BDR claims were made during the Claim Period, the Appellant has failed to satisfy this condition. In addition, there is evidence that the Appellant used factoring services during the Claim Period, the Appellant has failed to satisfy Condition 4 at paragraph 2.2 of VAT Notice 700/18. Mr Crampton's in cross-examination confirmed that he had no knowledge or involvement with TLL and the Schedules would imply that he had not seen everything in the whole Group.

43. The methodology used by the Appellant to quantify the BDR claim has not discharged the evidential requirements of Regs. 167 and 168 of the VAT Regulations. It is clear from the Appellant's own case that at least two sets of amounts were erroneously included in the original BDR claim:

(1) The reduction of the claim from £615,697 to £584,655 because the Appellant had incorrectly included sales percentages for NT Access Ltd which provided only services and was eligible for inclusion in the BDR claim.

(2) The sales of TLL. As there is evidence that BDR was previously claimed in relation to TLL, which the Appellant asserts is a "special case", the Appellant in its skeleton argument suggests that these amounts could also be removed from the claim.

This undermines any suggestion that the estimated claim was accurate or reasonable.

44. The facts in the Tribunal decision in *Saint-Gobain* were important and needed to looked at in detail. The decision was after the UT decision in *GMAC* but before the Court of Appeal decision in *GMAC*. There was no dispute in *Saint-Gobain* that the three companies were in the

VAT group, the decision was also a decision in principle. At [8], the witnesses were listed and, as in this appeal, included an application to admit further evidence. At [9], the accounting evidence was summarised, the accounting evidence was significantly more than what is before this Tribunal. A "White Book" was in evidence which set out details of the Saint-Gobain's specific provisions for bad debts and bad debts charged to the P&L account. At [10], Mr Leach, Saint-Gobain's witness, confirmed that the businesses did not have any old records evidencing: whether bad debts were incurred in the Claim Period, the terms and conditions used at the time and whether BDR had been claimed. Mr Leach's evidence was similar to that of Mr Crampton. At [11], HMRC's witness, Mr Lunn, confirmed that a claim that he thought similar to Saint-Gobain's claim had been made during the Claim Period. At [14]-[28], points were made that are almost identical points to those being made in this appeal. At [48], the Tribunal set out the correct approach to be adopted to determine if there were any prior claims to BDR. At [54]-[55] the Tribunal set out the approach on evidence and the burden of proof stating:

> "54. From the above cases I conclude that the correct approach to be adopted is:
>
> (1) The taxpayer bears the burden of proving, on a balance of probabilities that:
>
> (a) There were historical bad debts;
>
> (b) BDR was not previously claimed thereon; and
>
> (c) The amount of the BDR claim can now be reasonably and sustainable estimated or approximated by the taxpayer.
>
> (2) Practical difficulties may be encountered in attempting to substantiate historical claim, but the passage of time and consequent lack of records does not absolve the taxpayer from the obligation of proving the above matters.
>
> 55. In relation to where the burden of proof lies, this is only important where the application of the normal test of balance of probabilities results in a conclusion that there was insufficient evidence to reach a conclusion."

45. [56]-[90] set out a detailed discussion of the evidence. At [57] the Tribunal set out a typical RoT clause which was in similar terms to that exhibited to Mr Crampton's statement. The Tribunal made a finding of fact at [58] that it was unlikely that the goods would be sold on in the same condition. At [61]-[67], the Tribunal considered the legal status of the RoT and concluded that title would have passed irrespective of the RoT clause. At [69]-[70], the Tribunal agreed with HMRC's analysis that the Property Condition did not present a bar to BDR claims and that such claims were available at the time and Saint-Gobain was doing no more than attempting to make a very late claim without the requisite documentation. The same two consequences apply here.

46. At [71]-[76], the Tribunal considered the witnesses' recollection of Saint-Gobain's accounting treatment for bad debts. Mr Crampton did refer to a company file setting out the Appellant's procedures but it was referred to for the first time in oral evidence and was not in evidence before the Tribunal. At [86]-[90], the Tribunal held that Harcros, in the same line of business as the claimant companies, did make BDR claims during the Claim Period and this counted against Saint-Gobain on the question of whether that it is more likely than not that BDR was not claimed in the Claim Period. At [91]-[92], the Tribunal concluded that the Appellant had not shown that it more likely than not that no BDR claims were made in the Claim Period and the RoT clause did not prevent title passing to customers when the goods were consumed by being incorporated into building projects being undertaken by the customers.

47. It is of note that the Appellant's appeal was stayed behind the *Saint-Gobain* appeal to the UT. The UT, Judge Raghavan and Judge Brannan, upheld the decision of the Tribunal. At [42] to [46], the UT held that there was nothing illogical in the Tribunal accepting HMRC's argument that where the Property Condition did not present a bar to BDR claims it was more likely than not that VAT BDR claims were made. That was effectively an inference based on the evidence that if the Appellant could have claimed then it probably would have. The UT rejected the Appellant's allegations that the Tribunal in its findings of fact had wrongly disregarded or overlooked evidence, at [50], [63], [69] and [75]-[78]. Following the release of the UT decision in *Saint-Gobain*, the Appellant confirmed that it wished to pursue its appeal as there were important distinguishing factors

48. This appeal is squarely within the facts of the Tribunal decision in Saint-*Gobain* and, absent any basis for distinguishing the decision, this Tribunal is bound by the decision of the UT in *Saint-Gobain*. The Appellant's skeleton argument did not address the UT decision in *Saint-Gobain* nor set out why it did not apply here.

APPROACH ADOPTED

49. We consider it relevant that this appeal was stayed pending the decision in *Saint-Gobain UT* which was released on 29 March 2021. Following the release of the UT decision, the Appellant confirmed that it wanted to proceed with the appeal on the basis that the decision could be distinguished. As we observed at [33], the Appellant's submissions in this appeal repeat the submissions that were advanced before the Tribunal in *Saint-Gobain*, arguments that were rejected. It was only during oral submissions that the Appellant confirmed for the first time that *Saint-Gobain UT* could be distinguished on a factual basis because of the "quality" of Mr Crampton's evidence in this appeal. We have considered in detail the decisions of the Tribunal and UT in *Saint-Gobain* and Ms Black's submissions at [44] to [48]. Mr Crampton in cross-examination accepted, correctly in our view, that the Appellant's claim appeared very similar to that made in *Saint-Gobain*. We agree with HMRC that this appeal falls squarely within the facts and legal issues considered by the Tribunal in *Saint*-Gobain and that the decision in *Saint-Gobain UT* is binding upon this Tribunal. We have adopted and applied the reasoning of the Tribunal and UT in *Saint-Gobain*, which were unchallenged by the Appellant, in determining this appeal. We have below considered whether the "quality" of Mr Crampton's evidence is such that the decision in *Saint-Gobain UT* can be distinguished on its facts.

50. There was no dispute between the parties that the correct approach to determine the issues in dispute were as set out by the Tribunal at [54] in *Saint-Gobain*:

> "54. From the above cases I conclude that the correct approach to be adopted is:
>
> (1) The taxpayer bears the burden of proving, on a balance of probabilities, that:
>
> (a) There were historical bad debts;
>
> (b) BDR was not previously claimed thereon; and
>
> (c) The amount of the BDR claim can now be reasonably and sustainably estimated or approximated by the taxpayer.
>
> (2) Practical difficulties may be encountered in attempting to substantiate historical claims, but the passage of time and consequent lack of records does not absolve the taxpayer from the obligation of proving the above matters."

As confirmed at [4] above, we agreed to determine in principle whether the Appellant has satisfied the conditions for making an historic BDR claim and have not considered 54(1)(c)-the methodology and assumptions relied upon by the Appellant to calculate its BDR Claim.

APPROACH TO THE EVIDENCE

51. We have considered the statements of Leggatt J in *Gestmin SGPS S.A v Credit Suisse* [2013] EWHC 3560 ("*Gestmin*") at [15]-[22] under the heading of "Evidence based on recollection" when determining the reliance that we should place upon Mr Crampton's recollections. At [22], Leggatt J stated:

> "In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

52. In *Kogan v Martin and others* [2019] EWCA Civ 1645 the Court of Appeal considered *Gestmin* and at [88] Floyd LJ stated:

> "… First, as has very recently been noted by HHJ Gore QC in *CBX v North West Anglia NHS Trust* [2019] 7 WLUK 57, *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed."

53. Mr Southern accepted in response to the Member's question regarding the fallibility of human memory, that *Gestmin* and the other cases confirmed that memories fade and that we remember the past as we would have wished it to have happened; however, it was for the Tribunal to judge the reliability of Mr Crampton's evidence. Having heard and considered Mr Crampton's evidence, we have concluded that we should attach little if any reliance upon Mr Crampton's recollections and base our factual findings on the contemporaneous Schedules, the known or probable facts and his answers in cross-examination. The evidence in Mr Crampton's WS was stated with certainty but it was apparent when he was cross-examined that he could not provide answers with any degree of certainty. For the avoidance of any doubt, we accept that Mr Crampton was honest in the evidence that he gave but, understandably with the passage of over 20 years, we did not accept that his recollections and status within the Appellant's organisation provided reliable evidence of the Appellant's Group's terms and conditions and business practices that existed during the Claim Period.

DID THE ROT CLAUSE BLOCK BDR CLAIMS?

54. The Appellant submitted that during the Claim Period, UK law in the form of the Property Condition was incompatible with EU law as it deprived the Appellant of the ability to exercise a directly effective EU law right and fell to be disapplied. Therefore, as the Property Condition was invalid and fell to be disapplied, the Appellant's position is that legal questions of whether title had or had not passed when possession was transferred is not the issue, the fundamental issue is not the failure to operate the RoT clause but the defect in the legislation. HMRC submitted that any RoT clauses during the Claim Period would have been ineffective as property would have passed, the copy of the Appellant's Terms and Conditions dated 4 September 2000 exhibited to Mr Crampton's WS, expressly permitted the buyer to resell the

goods or, in any event, under s25. SOGA, where there was no permission to resell the goods, such resale would have constituted conversion of the goods leading to the Appellant's title being extinguished and some of the relevant goods would have been incorporated in a construction process such that the RoT Clause was ineffective, as the UT held in *Saint-Gobain*.

55. The Appellant, in its skeleton argument at [61], accepted that that "the type of goods which Allegion group sells are likely to be incorporated into buildings, e.g. door locks, and so lose their separate identity and become part of the building." Mr Crampton, in his oral evidence, provided a post-Claim Period example where goods had been sold that had been incorporated into doors in an NHS building and he accepted that such goods were not recoverable. In oral evidence, he was at pains to point out that during the Claim Period he was responsible for subsidiaries that only sold stand-alone products which were not incorporated- "box shifting", but accepted that the majority of the goods sold would have been sold on via various distribution channels. When it was put to Mr Crampton that a RoT clause did not necessarily prevent BDR Claims being made where the goods were incorporated or sold on but that it was the Appellant's choice not to follow-up those instances that prevented a claim to BDR, Mr Crampton merely stated it was the Appellant's policy not to give up RoT. It was not disputed by Mr Southern that s25(1) SOGA (indeed it was accepted at paragraphs 60 and 61 of his skeleton argument) provides that a buyer in possession of goods can, if certain conditions are fulfilled, give a good title to a person who acquires the goods from him which will defeat a RoT clause.

56. From the evidence we find that the majority of the goods purchased from the Appellant during the Claim Period would either have been sold on and then incorporated into other goods or premises or incorporated into other goods or premises. We find that it was highly likely due to the nature of the goods, that the purchasers would in short period of time use those goods in a process of construction or they would be attached to or incorporated into other goods or incorporated into premises such that they could not be readily removed.

57. At [57]-[70] of *Saint-Gobain FTT,* Judge Kempster considered the position in respect of incorporated goods and the Claimant's RoT clauses. The relevant paragraphs are:

> "60. HMRC contend that in the same circumstances the Property Condition did not present a bar to VAT BDR claims; property in the goods would pass to the customer when the goods were incorporated into the customer's building projects – for example, bricks being built into a wall. Thus, HMRC say (i) it is more likely than not that VAT BDR claims were made accordingly; and (ii) even if they were not made they could have been made, and the Appellant is now out of time to make such a claim (and further the Appellant accepts it is unable to produce the information required by regs 167-168 VAT Regs 1995).
>
> 68. … From my findings in [58] above I conclude that the builders' merchant's goods supplied by the Claimant Companies to their customers would have been consumed by being incorporated into other goods by the customers, probably within a short time of purchase from the Claimant Companies – for example, goods such as timber, bricks, copper pipe, electric cable and paint would be used on the customers' building projects in such a way that they were incorporated into the buildings and could not easily be removed, and further that the intention of the customers and the suppliers (the Claimant Companies) was that such incorporation was expected and permitted notwithstanding that the purchases had been on credit terms and the full price was still unpaid. On that basis, the title to the goods passed to the customers when they incorporated the goods into their building projects.
>
> 69. It follows that I agree with HMRC's analysis as summarized at [60] above. There are two consequences of that. First, it is relevant to the question of

whether earlier BDR claims were made. The Appellant maintains that Notice 700/18 was explicit that BDR was prevented by use of retention of title clauses and would have been relied upon by the Claimant Companies. However, while the Notice does not go into the legal detail to be found in BSG, it does explain that goods could have been passed on even if not paid for. There were several versions of HMRC (then HM Customs & Excise) Notice 700/18 in the Claim Period: issues April 1996, April 1991 and January 1996. They all contain the following statements:

> "You can claim relief from VAT on bad debts for goods or services that you supplied, if all the following conditions are met: … in the case of a supply of goods, ownership has passed to the customer or through him to a third party. You cannot claim bad debt relief if, for example, you supplied the goods under a contract which reserves title until they have been paid for, unless you follow the procedure [below] … If you supplied goods under a contract with a clause reserving title until they have been paid for (a "Romalpa" clause), and the goods have not been passed on, with good title, to a third party, you must send to the person in charge of the insolvency a statement formally giving up your rights under the clause."

The possibility of title passing prior to full payment was thus recognized in the Notice, and the explanation was repeated in March 2017 when HMRC published Customs Brief 1 (2017) – see [7] above, especially the paragraph headed "Evidence". …

70. The second consequence is HMRC's contention that even if no BDR claims were made in the Claim Period, such claims were available at the time and the Appellant is thus now doing nothing more than attempting to make a (very) late claim for the Claim Period, and without the requisite documentation. From my findings and conclusions I have to agree that it is the correct analysis."

58. In *Saint-Gobain*, the UT at [44] upheld the reasoning and conclusions of the Tribunal set out in above. We accept and adopt the reasoning and conclusions of the Tribunal in *Saint-Gobain* and, in our view, it follows from our finding of fact at [56] that a RoT clause would not have prevented the Appellant from claiming BDR during the Claim Period. That reasoning is equally applicable to goods that were sold on during the Claim Period. Therefore, BDR claims could have been made by the Appellant during the Claim Period and, applying the reasoning of the Tribunal in *Saint-Gobain* at [69], on the balance of probabilities it is more likely that not that the Appellant did make BDR claims during the Claim Period. There is no direct evidence before the Tribunal to undermine this conclusion, indeed, the evidence before the Tribunal, considered below at [64]-[72], is that it did make BDR claims during the Claim Period.

DID THE APPELLANT'S CONTRACTS CONTAIN A ROT CLAUSE DURING THE CLAIM PERIOD?

59. The earliest example of the Appellant's Terms and Conditions that could be found were dated 4 September 2000, after the Claim Period. Mr Crampton's recollection was that the Appellant's standard contracts during the Claim Period would have contained RoT clauses in similar terms. The Appellant sought to place reliance upon HMRC's Review Decision dated 16 December 2020 where it was agreed that "it is reasonable to accept, on the basis of continuity, that such terms existed in earlier years, and therefore during the claim period.". We are not bound by HMRC's concession and, unlike the HMRC Decision Maker and Review Officer, had before us the written and oral evidence of Mr Crampton.

60. From the evidence before us we find that it was more likely than not that the Appellant's standard Terms and Conditions during the Claim Period did not contain a RoT clause. Our reasons for that finding are as follows.

61. Mr Crampton's confirmed that his evidence relied upon his memory and recollections from the "last 20 years or so", those recollections post-dated the Claim Period. In oral evidence he stated that he recalled exercising a RoT clause in 1998 but could not recall if there were any examples prior to that date. Again, that recollection post-dates the Claim Period but, relevantly in our view, also post-dates the acquisition of Newman Tonks Group Limited by Ingersoll Rand in 1997. Mr Crampton confirmed that following the takeover there was a global review of the group and he accepted that it was possible that following the review the standard terms and conditions could have changed. Relevantly in our view, the earliest terms and conditions that could be located were dated 2000 which also post-dated the acquisition by Ingersoll Rand in 1997 and overlaps with the "last 20 years or so", the period covered by Mr Crampton's recollections.

62. During the Claim Period, Mr Crampton, contrary to the Appellant's submissions, did not hold a senior position in finance nor did he have responsibility for and knowledge of the Appellant's Group VAT procedures and company policy. In 1987 he was employed as a trainee accountant, in 1988 he was Assistant Accountant and in 1990 was promoted to Project Accountant. Those three generalist accounting roles were undertaken in different subsidiaries (subsidiaries which numbered between 25 to 30 in total) which each had their own autonomous accounting team, it was only in 2001 that the Appellant began the process of consolidating its accounts' teams into one team. It was accepted by Mr Crampton that during the Claim Period he did not see any of the returns submitted by other subsidiaries. His evidence was that he only knew what the procedures were for "subsidiaries that he was involved with and responsible for".

63. The Schedules were the only contemporaneous documents that were in evidence before the Tribunal and are considered in more detail below. The Schedules refer to VAT periods with a clear heading to each one e.g. "P 11/91 Bad Debt Relief Claimed in Error" with the reason for error given as either "Not 12 Months Old" or "Duplicated". The Schedule in respect of Laidlaw Thomson Group plc at the entry dated 2 October 1992 stated: "Bad debt relief claimed in error. 1) Not 12 months old 2) Duplicated". None of the reasons given for claiming BDR in error refer to either the Property Condition or a RoT Clause. Mr Crampton in response to cross-examination on the Schedules confirmed that he knew nothing that made TLL different from the Appellant's other 25 to 30 subsidiaries, he had no knowledge of or any involvement with TLL and, in response to questions on the use of factoring by TLL answered: "would imply that had not seen everything in the whole group, more widely used than I had seen."

PREVIOUS BDR CLAIMS

64. The Appellant submitted that, in respect of the Schedules, TLL was a special case that was "out on a limb doing its own thing" and there were good commercial reasons for that continued position. In any event, the sales of TLL could be excluded from the Appellant's claim to remove the possibility of over-recovery and this only became relevant at the quantum stage. The Schedules do not afford a ground for rejecting the whole claim. HMRC submitted that, following the reasoning of the Tribunal in *Saint-Gobain*, on the balance of probabilities, it is likely that the Appellant did make relevant BDR Claims during the Claim Period. There is no direct evidence to undermine this and the limited contemporaneous evidence that does exist indicated that BDR Claims were made and the Appellant used factoring during the Claim Period.

65. Mr Southern sought to challenge the Schedules on the basis that HMRC had not produced a witness to speak to the documents which are not self-explanatory; therefore, the Tribunal cannot place any reliance on the documents and they should be ignored.

66. HMRC's Statement of Case dated 24 May 2021 stated at paragraphs 26 to 35 that it relied upon the historic hand-written Schedules as evidence that, during the Claim Period, BDR was in fact claimed and factoring used by the Appellant. At paragraphs 26 and 30, HMRC stated that the Schedules were prepared by G J Green, Senior Officer, following visits to TLL's premises. HMRC's List of Documents dated 30 September 2021 included the Schedules under the heading of "Supporting Documentation". Mr Crampton's witness statement dated 28 October 2021 at paragraph 20 referred to the Schedules and, at paragraphs 21 to 26, provided his comments on the Schedules. The Appellant's skeleton argument at paragraphs 99 to 102 addressed the Schedules but no challenge was made to their provenance such that HMRC were required to prove the documents. Rather, at paragraph 100 of the Appellant's skeleton argument it was suggested that "The sales of TLL could be excluded from the Claim, to remove the possibility of over-recovery", it is implicit in that suggestion that the Appellant accepted the bona fides of the Schedules. We additionally note that at paragraph 108 of the Appellant's skeleton argument under the heading of "Questions 6: What approach should be taken to the evidence?", the Tribunal were urged to follow the approach in *NHS Lothian Health Board v The Commissioners for HM Revenue and Customs* [2020] STC 1112 ("*NHS Lothian*") and apply "a "reasonably generous" and "flexible" approach to the standard of proof and the admissibility of alternative evidence to support historic claims" but, in respect of the evidence that HMRC have located from historic records, urged the Tribunal to apply a higher standard and disregard the Schedules. We do not accept that *NHS Lothian* provides any assistance to the Appellant nor to this Tribunal as in that appeal it had already been accepted that there was a valid historic BDR claim, all that was in dispute was the quantification of the claim. In marked contrast, in this appeal it has not been accepted by HMRC that the Appellant has established that it has a valid BDR Claim.

67. In our view, it is simply too late for the Appellant in oral submissions to state that it challenged the Schedules and requires HMRC to prove historic documents that were referred to and relied upon as far back as 14 October 2020 when refusing the Appellant's BDR Claim. The Tribunal is aware of the provisions in the Tribunal Procedure Rules which permit the admission of evidence that would not be admitted under the CPR and it is a matter for us to consider what reliance, if any, should be placed on that evidence. We note that the UT in *Edwards v HMRC* [2019] UKUT 131 (TCC) at [50] stated:

> "the FTT, correctly in our view stated that documents on their own without a supporting witness statement may be sufficient to prove relevant facts".

68. We consider it inherent in historic claims such as this that documents will be relied upon by the parties (usually the taxpayer) without a supporting witness statement as the author of those documents will, from the passage of time, no longer be employed, have retired or died. Accordingly, we reject the Appellant's submissions in respect of the Schedules. We find that the Schedules are self-explanatory historic documents that record the details of VAT inspection visits by HMRC to a TLL branch and without more are sufficient to prove relevant facts.

69. The Schedules stated as follows:

(1) The Schedule dated 2 July 1991 had the heading "Newman Tonks Group plc Vat No 110 6214 33, Thomas Laidlaw Ltd Branch 0510 and Schedule of Irregularity". Under the sub-heading of "P [Period] 05/91" it recorded "Tax point errors on factoring charges" in respect of "Region 5 (Mids), Region 6 (SE) and Region 7 (SW) and provided an internal reference number. At the bottom it stated "Prepared" followed by the signature

of GJ Green and dated 2.7.91. Underneath "Prepared" it stated "Checked" and was signed by a person unknown and also dated 2.7.91.

(2) The Schedule dated 27 September 1991 had the heading "Newman Tonks Group plc Vat No 110 6214 33, Thomas Laidlaw Ltd Branch 0510 and Schedule of Irregularity". Under the subheading "P 08/91" it stated "Factoring Charge Tax Point Error. Previously assessed in P 05/91 not adjusted" and for the same Period: "Tax point error on factoring charges" followed by a reference number and then the stated region: "South East, South West and Midlands." At the bottom it stated "Prepared" followed by the signature of GJ Green and dated 27.9.91. Underneath "Prepared" it stated: "Arithmetically Checked" and was signed by a person unknown and dated 30.9.91.

(3) The third Schedule is undated and unsigned but has the same distinctive handwriting as the two other signed Schedules. The heading states: "Newman Tonks Group plc Vat No 110 6214 33, Thomas Laidlaw Ltd Branch 0510 and Schedule of Irregularity". Under the sub-heading "Bad debt relief claimed in error" there are entries for the P 11/91, P 02/92, P 05/92, and P 08/9. The entries all record a reference beginning with the letter "J", identify the region, customer name followed by the reasons for the error. The reasons stated for the error are either "not 12 months old" or "duplication".

70. Mr Crampton in cross-examination confirmed in respect of the Schedules that: TLL was a subsidiary acquired in the early 1990s, was part of the Appellant's VAT group, the Schedule referred to Newman Tonks Group plc, the former name of the Appellant company, and referred to the same VRN (110 6214 33) as the Appellant and he was not aware of anything to suggest TLL was different to any of the other subsidiaries. He agreed that the Schedules confirmed that TLL had made BDR Claims and used factoring during the Claim Period. His evidence was that every subsidiary was self-accounting and that he had not had any involvement in that subsidiary. His answer in response to cross-examination on the factoring referred to in the Schedules was that "would imply that not seen everything in whole group, more widely used than I had seen". We find on the evidence that BDR was claimed and factoring used by TLL, a member of the Appellant's VATA Group, during the Claim Period.

71. The Appellant asserted that TLL was a "special case" and "out on a limb" and could be disregarded for the purpose of the Appellant's BDR Claim and an adjustment made to the quantum of the claim. We disagree. We note that in *Saint-Gobain* at [89] similar arguments were advanced in respect of the Harcros share purchase VAT Warranty as are advanced here in respect of the Schedules. At [90], the Tribunal rejected that submission:

> "I consider this evidence is far more important that [sic] the Appellant is prepared to accept. It is evidence that Harcros as one of the Claimant Companies – and which, unlike Customer One, was in exactly the same line of business as the other Claimant Companies – did make VAT BDR claims during the Claim Period. Accordingly, this is evidence that counts against the Appellant on the question of whether that it is more likely than not that VAT BDR was not claimed in the Claim Period."

72. Whilst the Appellant has sought to downplay the significance of the Schedules by asserting that it was "a much more minor problem" than the Harcros evidence in *Saint-Gobain* and could be explained by Mr Crampton's evidence, we reject that submission. We consider it significant that the only contemporaneous evidence placed before the Tribunal confirmed, as we have found, that during the Claim Period, BDR was claimed and factoring used by a member of the Appellant's VAT Group. The importance of that evidence cannot be overlooked by simply removing that element from the Appellant's claim

HISTORICAL BAD DEBTS

73. There was no evidence before the Tribunal that any consideration had been written off by the Appellant in its accounts as a bad debt. HMRC, in their Statement of Case dated 24 May 2021 at paragraph 24 stated: "Further, HMRC make no admission as to what percentage, if any, of such sales resulted in bad debts written off by the Appellant. HMRC put the Appellant to strict proof of the same. HMRC in their skeleton argument at paragraph 40 confirmed that position and, referring to the Appellant's skeleton argument stated:

> "40. … The ASA [Appellant's Skeleton Argument] at [80]-[85] sets out a, brief, description of the methodology used to calculate the BDR Claim. This simply asserts that the accounts show the percentage of bad debts suffered. No accounts have been included in the evidence before the Tribunal, however.
>
> 41. In addition, the points made at ASA [75]-[78] [under the heading of "Accounting questions" set out what the Appellant considered would been the accounting approach to bad debts during the Claim Period] do no derive from any evidence that is before the Tribunal
>
> 42. Therefore, the Appellant has failed to establish it suffered a bad debt."

74. Mr Crampton's evidence at paragraph 27, bullet point three of his WS was that "There was no process in place retrospectively to review potential VAT bad debt relief claims and make these outside of the normal VAT return cycle. Allegion simply took the view that no claims to BDR were available because of its terms and the BDR scheme required that title be surrendered to the debtor." It was put to Mr Crampton that if paragraph 27, bullet point three, was true then there was no evidence to support the Appellant's claim and if there was no process that was entirely the Appellant's choice. In answer, Mr Crampton confirmed that there was no process in place to review bad debt claims. The Appellant's skeleton argument at paragraphs 80 to 85 set out a brief description of the methodology used by the Appellants to calculate the BDR Claim. That assertion, not evidence, is only relevant to the calculation of the quantum of the claim. As there was no evidence before the Tribunal that the Appellant suffered any bad debt during the Claim Period, we find that the Appellant has failed to establish that it suffered any bad debt during Claim Period.

BURDEN OF PROOF

75. The Appellant accepted the burden of proof rests on it to demonstrate that the conditions for a valid BDR Claim set out in Regs 167 and 168 VAT Regulations 1995 are met. HMRC's position is that the Appellant has failed to discharge that burden as the Appellant simply cannot evidence its claim. Although we were urged by the Appellant to "adopt a flexible approach to the burden and standard of proof in connection with historical claims for repayment" (*NHS Lothian* at [67]) our view at [66] was that *NHS Lothian* is of no assistance as there it had already been accepted that a valid claim had been made. The Appellant submitted that HMRC were seeking to deny the Appellant's *San Giorgio* rights as the requirement of proof which has the effect of "making virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law." We disagree.

76. The Tribunal in *Saint-Gobain* at [54] relevantly stated in respect of the burden of proof:

> "(2) Practical difficulties may be encountered in attempting to substantiate historical claims, but the passage of times and consequent lack of records does not absolve the taxpayer from the obligation of proving the above matters."

77. That statement by the Tribunal in *Saint-Gobain* was not appealed nor was it challenged before this Tribunal. In *Regency Factors plc v The Commissioners for HM Revenue and Customs* [2022] EWCA Civ 103, the Court of Appeal at [22]-[37], considered the domestic

BDR legislation and held that the UT had been correct to find that the requirements of reg.168 VAT Regulations 1995 were not unduly onerous and contributed to ensuring the correct collection of VAT, preventing tax evasion and eliminate the risk of loss of tax revenue. At [37], Lewison LJ stated:

> "Taken as a whole, therefore, in agreement with the UT, I consider that the UK's domestic VAT regime complies with EU law."

78. Regs 167 and 168 VAT Regulations 1995 and R&C Brief 1/2017 confirmed that a claimant was required to demonstrate that bad debts had been incurred in the relevant period and that no prior claims for BDR had been made. There were no primary records or evidence on behalf of the Appellant in evidence. The Appellant solely relied upon the evidence of Mr Crampton to satisfy the evidential requirements for a Claim to BDR but as stated above, we did not accept that his evidence met the evidential requirements for an historic BDR Claim. We find that the Appellant has not discharged the burden of proof to demonstrate that the conditions for a valid BDR Claim were met.

CONCLUSION

79. The Appellant has not discharged the burden of proof to demonstrate that the conditions for a valid BDR Claim were satisfied. The only evidence relied upon by the Appellant was the witness evidence of Mr Crampton. We attached little, if any, weight to Mr Crampton's evidence and found that his evidence provided no basis to distinguish on factual grounds the binding decision in *Saint-Gobain UT*. The facts of this appeal were squarely within the facts of *Saint-Gobain* and, applying the same reasoning, the RoT Clause in the Appellant's standard terms and conditions would not have prevented a BDR Claim. In any event, we found on the basis of the evidence before us that it was more likely than not that the Appellant's standard contract terms and conditions did not during the Claim Period contain a RoT Clause. The only documentary evidence that was in evidence before the Tribunal, the Schedules, confirmed that the Appellant had previously claimed BDR.

80. For all of the above reasons, we dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

81. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JUDGE GERAINT WILLIAMS
TRIBUNAL JUDGE

Release date: 07th MARCH 2023